Crafting Remedies for Bad Faith
Bargaining, Coercion and Duress: ‘Relative Ethical Flexibility’ in the Twenty-first Century

Margaret Lee*

The Workplace Relations and Other Legislation Amendment Act 1996 (Cth) deleted the former statutory requirement that employers and employees must bargain fairly and in good faith with each other. Nevertheless, notions of bargaining in good faith, unconscionability and fair dealing continue to figure in the legal and industrial strategies of the parties, and in decisions made by the Australian Industrial Relations Commission and the Federal Court. Indeed, both employers and unions, usually repeat players, have sought arbitral remedies from the commission to counter perceived unfair bargaining conduct, as well as remedies from the court to stop or punish alleged coercion and duress in bargaining. The focus of this article is to uncover the practical operation and interaction of the relevant provisions and the efficacy of the available remedies, not only for the parties concerned, but for industrial strategies in general. It is argued that the commission and the court construct these provisions and remedies in ways that support employer strategies and interests to the detriment of unions and employees, thus shifting the balance of bargaining power even further in favour of employer parties. It is far easier for employers to limit the ethical flexibility permitted to unions and employees in bargaining, than it is for unions to compel employers to bargain fairly.

Introduction

One of the objectives of the Workplace Relations Act 1996 (Cth) (the WR Act) is to provide a framework for ‘co-operative workplace relations’ by ‘providing a framework . . . which supports fair and effective agreement making’, yet it neither directly requires fair bargaining nor directly prohibits unfair bargaining. However, it does prohibit duress in connection with the making of Australian Workplace Agreements (AWAs) and coercion in relation to bargaining about Certified Agreements (CAs), permits industrial action in specified circumstances and, in a round about way, requires parties to genuinely try to reach agreement. Parties in a work relationship, and ‘the person on the street’, would perhaps think at first that this is just a typically complicated way of saying that the WR Act requires parties to bargain fairly. With the parties bargaining in the shadow of the law, the legal limits of bargaining behaviour really matter, and these limits can be rather different

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* Socio-Legal Research Centre, Griffith University and Griffith Business School, Department of Industrial Relations, Griffith University. The research on which this article is based was undertaken as part of a PhD project in the Griffith Law School about the construction of Australian labour law remedies. My thanks go to my supervisors, Rosemary Hunter and Sandra Berns, and the anonymous referee for their insightful comments.

1 Section 3(e).
from those suggested by colloquial understandings of fair conduct. In 1999 a Full Bench of the Australian Industrial Relations Commission (the commission) inferred that the legal limits might be quite elastic, saying that under the WR Act’s framework, the adage ‘all is fair in love and war’ now applied to bargaining processes.² Munro J thoughtfully suggested that the statement had ‘too much potential for libertine conduct [in bargaining]’ to be a reliable guide to what was ‘permissible’. ‘Nonetheless’, his Honour continued, ‘it points to a tolerance of relative ethical flexibility in the conduct of bargaining periods and protected action’.³ More recently, a Full Federal Court suggested:

Fundamental to Pt VIB of the Act is the notion that, within strict and objectively definable limits, organisations, employees and employers are entitled to engage in industrial warfare.⁴

On appeal, the High Court thought the comment about industrial warfare was to be deprecated in light of the WR Act’s objectives.⁵ In the light of these somewhat contradictory approaches taken by judges and commissioners, questions arise about the nature and extent of legal measures open to the parties to counter bad faith or unfair bargaining tactics. This article is concerned with the legal strategies developed by the parties to draw and re-draw boundaries around ‘relative ethical flexibility’ in bargaining and to restrict the other party’s unfair exercise of bargaining power, especially in the context of disputes about the level of bargaining.⁶ Indeed, the commission Full Bench’s observation discussed above continues to reverberate in cases before the commission and the courts where applicants seek remedies for bargaining conduct they allege amounts to coercion, or duress, or which shows that the respondent has failed to genuinely try to reach agreement. The focus here is on the construction of arbitral remedies available from the commission for alleged unfair bargaining conduct, and of curial remedies from the Federal Court (the court) for breach of the coercion and duress provisions, with a view to uncovering the efficacy and strategic role of the remedies in industrial relations practice. The article begins with a very brief overview of the concepts of fair bargaining and bargaining in good faith. It then turns to the relevance of these concepts in matters before the commission and how they are constructed and the kinds of remedies the commission awards in cases where unfair bargaining is alleged. The final two sections of the article deal with court decisions concerning duress and coercion, comparing these concepts to notions of what is fair bargaining conduct.

Some conclusions are drawn. The first is that the parties have experimented

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² CFMEU v Coal & Allied Pty Ltd (1999) 93 IR 82 at [23].
³ Section 113 application to set aside award, Major Engineering Pty Ltd (2001) 129 IR 123 at 34.
⁶ The level of bargaining is a dimension of the theoretical construct of bargaining structure. It refers to whether bargaining takes place at the individual, employer or industry level. See, eg, the discussion by M Bray and P Waring, ‘Complexity and congruence in Australian labour regulation’ in AIRAANZ, The 2003 AIRAANZ Conference, Melbourne, 2003.
with various legal strategies to enforce aspects of bargaining in good faith, but that the relevant provisions operate in ways that support employer strategies at the expense of union and employee interests, tending to shift the balance of bargaining power in favour of employer parties. The second is that the efficacy of remedies is a significant factor in the development of industrial relations strategies, perhaps more so than is true of the substantive rights and obligations. Finally, it is apparent that the limits of ‘relative ethical flexibility’ are determined by cases brought by repeat players which alter the shape of the bargaining paradigm for all participants in the federal system.7

The Concept of Bargaining in Good Faith

The balance of bargaining power between employers and workers is a key determinant of bargaining outcomes, and is open to manipulation in a variety of ways.8 Typically important amongst manipulation techniques is the ability to strategically employ pressure tactics, which apart from industrial action, might also include ethically questionable negotiating tactics, such as withholding or misrepresenting information, using various kinds of ‘stand-over’ tactics, dismiss workers if they won’t agree, and unilaterally changing working conditions.9 Statutory bargaining paradigms modelled on the US framework seek to address the power imbalance and promote fair bargaining by regulating bargaining processes both inside and outside the formal negotiation room. The first key measure is the union recognition procedure, which specifies the conditions under which an employer can be required to recognise a union for bargaining purposes. The others are the requirement that negotiators bargain in good faith and the ‘legalisation’ of industrial action linked to the negotiation of a new collective agreement. Bargaining in good faith under this framework has been described as requiring a serious attempt to adjust differences and reach acceptable common ground, the making of counter-offers involving ‘give and take’ and not constantly changing one’s position or engaging in evasive behaviour.10

The Industrial Relations Reform Act 1993 (Cth) (the Reform Act) amendments inserted provisions in the then Industrial Relations Act 1988 (Cth) (the IR Act) empowering the commission to make orders for the purpose of ensuring that the parties bargain in good faith.11 Such orders could include an order that ‘a party take or refrain from taking, specified action’.12 These provisions picked up the US concepts, but as Naughton points out, while the commission could issue directions to assist negotiations already under way the

9 Lewicki, Saunders and Minton, above n 8.
11 IR Act s 170QK(2)(a).
12 IR Act s 170QK(2).
IR Act did not directly impose a duty to bargain in good faith which could then be directly enforced. 13 In one decision, a Full Bench of the commission decided that bargaining in good faith did not require the making of concessions, but did require approaching the negotiations with a genuine desire to reach agreement. 14 While the latter requirement was not specified in the IR Act, it remains part of US bargaining law despite the criticism that in practice it requires the parties to approach negotiations with a willingness to compromise. 15 The Workplace Relations and Other Legislation Amendment Act 1996 (Cth) (the WROLA Act) introduced by the Liberal-National Party Government removed the bargaining in good faith provisions altogether. Critics have commented that the resultant gap in the WR Act, together with the availability of AWAs and the absence of any requirement that an employer must actually negotiate with a union the availability of AWAs, supports union avoidance strategies and the individualisation of the work relationship, thus shifting the balance of power towards employers. 16

The WROLA Act, however, did introduce a requirement that parties ‘genuinely try to reach agreement’ in several provisions mainly related to remedies for industrial action as well as adding a new prohibition on coercion (with respect to bargaining for CAs) and duress (with respect to AWAs), together with a set of related penal provisions and curial remedies. 17 Unions have responded by developing legal strategies based on these aspects of the WR Act in attempts to force a species of good faith bargaining on employers virtually by the back door. In some cases, the commission has accepted union submissions that there is an implicit duty to bargain in good faith in the WR Act framework. Munro J even characterised a refusal by an employer to recognise ‘a lawful and substantially supported representative of employees collectively as the appropriate negotiating party’ as an unfair bargaining practice, although the conclusion was in the event not material to the s 166A application before him. 18 As the next section reveals, the view that there is an implied duty to bargain in good faith in the WR Act is by no means universally accepted within the commission and, even in cases where it is accepted, this

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13 See Naughton, above n 10, p 87.
14 Appeal by the Public Sector, Professional, Scientific, Research, Technical, Communications, Aviation and Broadcasting Union (unreported, AIRC, Full Bench, 31 August 1994), (1994) AILR 372. See also the discussion by Naughton, above n 10, p 96.
15 See also the discussion by Naughton, above n 10, p 96.
16 The critics include S Deery and R Mitchell, ‘The Emergence of Individualisation and Union Exclusion as an Employment Relations Strategy’ in S Deery and R Mitchell, Employment Relations, Federation Press, Sydney, 1999 and R McCallum, ‘Trade Union Recognition and Australia’s Neo-liberal Voluntary Bargaining Laws’ (2000) 57(2) Industrial Relations (Canadian) 225. McCallum noted that something similar to the union recognition procedure is essential to force recalcitrant employers to the bargaining table. However, as Forsyth has pointed out, union recognition procedures presently remain but a policy option for a future Labor Government: A Forsyth, ‘Proposals for Statutory Union Recognition Rights in Britain and Implications for Australia’ (1999) 12 AILL 32.
17 For a discussion of the framework, see Creighton and Stewart, above n 8, Chs 8 and 9.
18 Section 166A giving of notice of intention to take an action in tort Morris McMahon and Co Pty Ltd and AMDEPKIU (unreported, AIRC, Munro J, Print PR931192, 8 May 2003). Despite berating the employer Morris McMahon for this unfair bargaining behaviour, his Honour had no choice but to issue the s 166A certificate sought.
implied duty tends to be of more practical utility for employers than for unions.

**Strategies in the Commission to Counter Perceived Unfair Bargaining Behaviour**

**Employer tactics to terminate certified agreements under s 170MH**

Orders under s 170MH terminate a CA, and can and do operate as de facto remedies that influence the balance of bargaining power. A CA comes into operation when it is certified and remains in operation until its nominal expiry date has passed and a subsequent CA replaces it, or until it is terminated. A CA can be terminated in a way that the CA itself specifies, by agreement of the parties, by the commission because undertakings given by a party are not complied with regarding a new CA or a variation to a CA or by order of the commission on application of one of the parties under s 170MH. Section 170MH provides that after the nominal expiry date of a CA, an employer, a union bound by the agreement or the employees covered by it may apply to the commission for an order terminating it. The commission must obtain the views of persons bound by the CA, but these views are not determinative of an application, since s 170MH(3) provides that the commission must by order terminate the CA if it ‘considers it is not contrary to the public interest’ to do so. In determining where the public interest lies in a particular case, the commission is guided by s 90 of the statute. This section provides that the commission must take the public interest into account in the exercise of its functions and directs that, for that purpose, it must consider the objects of the WR Act, the state of the national economy and the effect its decisions are likely to have on unemployment and inflation. It is inescapable then that the public has an interest in ensuring that bargaining is fair and effective, in accordance with the objective in s 3(e).

In contested s 170MH cases, the applicant party is usually the employer. Although there do not appear to have been any applications solely by unions, there are a few cases where all relevant parties have consented to the termination of a CA, such as where there are no employees left doing the work it covered or where a new agreement has been reached. Once a s 170MH order is granted the relevant, and inferior, safety net award resumes the regulation of wages and conditions of the employees, thus exerting economic

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19 Sections 170LX(1) and (2).  
20 Section 170MHA.  
21 Section 170MG.  
22 Sections 170LV and 170ME.  
23 The High Court’s guidance on how to determine where the public interest lies is that it requires a balancing of interests, is a question of fact and degree (see *Re Queensland Electricity commission; Ex Parte Electrical Trade Union of Australia* (1987) 61 ALJR 393 at 395 per Mason CJ, Wilson and Dawson JJ; 72 ALR 1), and that the whole circumstances must be weighed up (see *Re Australian Insurance Employees Union; Ex part Academy Insurance Pty Ltd* (1988) 78 ALR 466 at 46 per Dawson J).  
24 An example of the former is *Telstra Corporation Ltd; Re Telstra Network Operations/CWU — Operations and Maintenance Agreement 1994* (unreported, AIRC, Duncan DP.
pressure on them to agree to the employer’s demands in current bargaining. Such an order thus acts as an effective remedy to (perceived) union intransigence in bargaining and benefits the employer’s bargaining position. In these cases, unions have argued that the order should be refused because it would reduce the pay and conditions of the employees covered by the CA and because the employer has not negotiated in good faith. Hence, they say, terminating the CA would be contrary to the public interest in ensuring that bargaining is conducted fairly. The commission, however, has taken the view that there is no general public interest arising from reductions in wages and conditions unless the employer has not been bargaining in good faith in other respects.

This principle emerged from the decision in Re Joy Mining Machinery Certified Agreement. The employer and the AMWU had been bargaining for a new CA. The facts showed that Joy, the employer, had abruptly broken off negotiations with the union, switched to ‘negotiating with four sets of employees contrived by the employer as separate negotiating parties’, held a three month lockout, engaged in conduct showing that Joy was ‘adverse’ to recognising the union and that its financial affairs affected its bargaining conduct. Joy sought an order terminating the CA, and while it agreed to continue to pay the wages provided in the CA if the order was granted, in other respects the safety net award would apply. The union, on the other hand, submitted that the employees would suffer a reduction in many conditions of employment if the CA was terminated, that Joy had not negotiated in good faith, and that it would be contrary to the public interest to grant the order. Munro J decided that a loss of working conditions resulting from an order to terminate a CA does not itself generate a public interest unless it concerns the loss of accrued rights, because the WR Act does not provide for an indefinite continuance of the terms of an expired agreement and provides for a safety net award. However, he thought that the union’s contention that Joy had not bargained in good faith did raise the public interest. His Honour said it was ‘reasonable, perhaps even necessary, to accept that an obligation of the kind (to bargain in good faith) may be collateral to the specific rights and duties that

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25 Section 170MH termination of certified agreement Joy Manufacturing Co Pty Ltd (unreported, AIRC, Munro J, Print T1133, 25 September 1996). The first contested case, Re Mt Thorley Operations Enterprise Agreement 1996 (unreported, AIRC, Boulton J, Print R7850, 4 August 1999), concerned the employer’s application to terminate a CA made under the IR Act. Mt Thorley Operations argued that altered economic conditions and falling prices made it imperative that a new CA be agreed, but that agreement seemed very unlikely. They said that the ordinary wages of employees would be maintained for an unspecified period, and the award would provide other conditions. Boulton J specifically took into account the fair bargaining objective in s 3(e) and the authorities discussed above in determining the public interest. He refused to terminate the CA because it was contrary to the public interest to do so. His Honour provided four reasons: there had not been sufficient opportunity for negotiations to take place; terminating it might ‘remove an incentive for the parties to finalise negotiations’; there was a greater likelihood of industrial disputation if the CA was terminated because of uncertainty regarding the subsequent level of wages and conditions; and it had not been established that the continued operation of the CA would in fact hinder the operation of the business.
constitute the process established’. Those duties included a duty to genuinely try to reach agreement, on which s 170MP and paras 170MW(2)(a) and (b) are predicated. Munro J concluded that ‘there is a more or less explicit duty to genuinely try to reach an agreement’. He decided that it would be against the public interest to terminate a CA where failure to agree on a new one was a result of the applicant party’s failure to bargain in good faith, as in the case before him. His Honour stated he would have refused to terminate the CA but for Joy’s agreement to participate in consent arbitration.

The result appears to be that employees who are resistant to demands being made of them in bargaining can be deprived of wages and conditions virtually at the whim of an employer who is otherwise bargaining ‘fairly’. An employer might decide to continue with some aspects of the terminated CA, but that is the employer’s unilateral decision. The commission does not see anything contradictory in the view that seeking an order to terminate a CA is not in itself an unfair bargaining tactic even if it results in reduced wages and conditions. Indeed its view is that the WR Act specifically contemplates such tactics and results. In a more recent case, Bacon C baldly stated, ‘[t]he AMIEU’s submission that the parties carry an implicit duty to bargain in “good faith”’, but still issued the order to terminate the CA even though wages and conditions would decline as a result. It is ‘simply irrelevant’ that the employees would henceforth be working for reduced wages and conditions under the safety net award, or perhaps for better terms at the option of the employer. The only exception to this rule is where accrued entitlements such as redundancy pay will be lost in the context of the likelihood of retrenchments.

26 Joy Manufacturing, above n 25, at 13, his Honour cited similar statements by several other commissioners to that effect.
27 Section 170MP provides that a party must genuinely have tried to reach an agreement before taking protected action.
28 These paragraphs specify a failure to have genuinely tried to reach an agreement as reasons for suspending or terminating a bargaining period. This concept is discussed further below.
29 Joy Manufacturing, above n 25.
30 Pursuant to s 111AA.
31 Consolidated Meat Group Pty Ltd Rockhampton Certified Agreement 1999 (unreported, AIRC, Bacon C, Print PR916493, 8 April 2002).
32 Re Geelong Wool Combing Ltd Certified Agreements (unreported, AIRC, Whelan C, Print PR937499, 5 September 2003). For other cases where this position has been adopted and the CA terminated, see also Re BHP AIS Steel Certified Agreements (unreported, AIRC, Wilks C, Print PR900264, 15 January 2001); Re Australian Country Choice Pty Ltd Beef Boning Certified Agreement 1996 (unreported, AIRC, Bacon C, Print PR921274, 13 August 2003); Consolidated Meat Group Pty Ltd Rockhampton Certified Agreement 1999 (unreported, AIRC, Bacon C, Print PR916493, 8 April 2002); Re Capricorn Coal Management Pty Ltd and CFMEU and CEPU Certified Agreement 2001 (unreported, AIRC, Bacon C, Print PR939652, 21 October 2003).
33 Re Geelong Wool Combing Ltd Certified Agreements (unreported, AIRC, Whelan C, Print PR937499, 5 September 2003). Whelan C held that a previous CA later ‘superseded’ by a current CA may come back into operation if the latter CA is terminated. There the employer sought termination of a number of old agreements, with the intention of reverting to the relevant award which provided substantially inferior redundancy and long service leave conditions. The commissioner refused to make the orders sought because of the loss of these accrued entitlements in circumstances where redundancies were likely.
This broad approach to determining whether a refusal to terminate a CA would be contrary to the public interest was confirmed by the commission in a complex dispute involving demands by Esso Petroleum to introduce longer fly in, fly out rosters on certain oil rigs. At first instance, Whelan C refused to terminate CAs between unions and certain employers who were re-negotiating their contracts with Esso Petroleum to perform work on Esso’s off-shore drilling rigs. Direct employees of Esso also worked on the rigs. The work was organised on a fly in, fly out basis on a seven day/twelve hour shift roster, requiring the employees to spend the entire seven working days away from home, living as well as working on the drilling rigs. Esso wanted to replace this roster with a 14 days on and 14 days off roster, and a term of its proposed contracts with the contracting firms was that the employees of those firms would work such a roster. Consequently, the contracting firms were demanding this of the unions in their negotiations for new CAs. The unions concerned resisted this demand. Termination of the CAs would have resulted in the re-emergence of the (inferior) award as the instrument regulating the terms and conditions of the employees. While this award would not have permitted the unilateral introduction of the new rosters, the commissioner pointed out that termination of the CAs would have significantly shifted the balance of power in the employers’ favour, but that this in itself did not raise the public interest. However, two other considerations suggested that such terminations would be contrary to the public interest. Commissioner Whelan took the view that Esso, although a ‘stranger to the agreement’, was playing a determinative role in the CA negotiations, and that this meant the employers themselves were not genuinely trying to reach agreement with the union. She also held that the proposed rosters had serious health and family implications. For these reasons, Whelan C concluded that terminating the CAs would be contrary to the public interest and therefore refused to make the orders sought.

Six months later, a Full Bench of the commission overturned the commissioner’s conclusions, but not her general approach. The Full Bench decided that she had been wrong to conclude that Esso’s influence over the contractors was ‘contrary to the Act’ and that she had erred in giving weight to the fact that the contractors were seeking to introduce new rosters. The employers offered to maintain wages at the levels provided in the CAs for a month while negotiations continued. Only one day after this decision, the parties reached a deal which included substantial pay increases and a provision that the seven day roster could only be changed if Esso’s direct workforce accedes to a new roster. The Australian Workers Union expressed confidence that those workers held sufficient bargaining power to resist

35 Ibid.
36 Section 45 Appeals against decision issued by Commissioner Whelan on 7 September 2004 (unreported, AIRC, Full Bench, Print PR955357, 31 January 2005).
demands for a 14 day roster. Regardless of whether this belief turns out to be a practical reality, Whelan C’s refusal to terminate the existing CAs effectively stymied Esso and the employer companies’ immediate roster strategy. It must be borne in mind, however, that in s 170MH cases, a union submission that the other party is not bargaining in good faith can only be raised as a shield and not as a sword. The commission takes a similar approach in applications to terminate AWAs.

**Strategies to terminate AWAs**

Once it commences, an AWA operates until a refusal to approve notice is issued by the Employment Advocate (the EA), until another AWA between the employer and employee starts to operate, or until it is terminated pursuant to s 170VM. Section 170VM(1) provides that the employer and employee may make a written agreement at any time to terminate an AWA. Section 170VM(3) provides that after the AWA’s nominal expiry date, the commission may terminate it on application of one of the parties if it considers that it is not contrary to the public interest to do so. Thus, the commission has a general discretion in deciding whether to terminate an AWA compared to its limited discretion to terminate a CA. Where an order is made, the safety net award resumes regulation of the employee’s wages and conditions. Alternatively, if a CA is in operation at the employer’s business and covers the work done by the employee, then it would do so.

There are relatively few s 170VM cases, but in those that have been reported applications for orders have been made in broadly equal numbers for employers and employees. Employee applications appear to be part of union campaigns to replace AWAs with collective agreements or awards at the workplace in question, while employer applications are made in the context of wanting to change the terms and conditions of the employee. Applications under this section provide the only occasions the commission has any opportunity to examine the bargaining processes surrounding an AWA. Like s 170MH decisions, uncertainty about or a reduction of terms and conditions resulting from an order to terminate an AWA is not sufficient on its own to raise a public interest. In the first and, at the time of writing, the only Full Bench decision on s 170VM(3), Section 45 Appeal, RW, it was held:

In our view, in a system which is predicated upon the notion of bargaining from a basis of minimum standards, the only public interest involved in the aspect of the regulation of the terms of the employment of those employees is whether there would be in place a safety net in relation to those terms if the AWAs were to be terminated.

38. Section 170VM(1).
39. The commission has little role in the approval process because the EA approves an AWA in private, administrative proceedings (s 170VPB). The commission is only involved in approval where the EA has ‘concerns’ about whether an AWA passes the no disadvantage test (s 170VPC(3) and s 170VPE). Proceedings before the commission must be held in private (s 170WHD), and the requirement that the identity of parties to an AWA be kept secret also applies to decisions by the commission (s 170WHB).
40. *RW, Re* (2003) 125 IR 307. The Full Bench held that the commission must first ensure that the three ‘conditions precedent’ in s 170VM(3) are satisfied. These are that the AWA has
The case was part of a bitter dispute in the meat processing industry between the union and the employer about the level of bargaining and the role of the union at the workplace. There were AWAs and a CA currently in place, all had passed their nominal expiry dates and the employer wanted all employees to sign new AWAs. Some employees were resistant, and applied for an order to terminate their AWAs so that they could be covered by the CA. At first instance, no submissions regarding a failure to negotiate in good faith were made by either party but the application was refused. The appeal by the AMIEU on behalf of the employees was allowed and the first instance decision quashed.

As is the case with s 170MH applications, the commission will refuse to terminate an AWA only where there has been a failure to negotiate in good faith by the applicant and the termination will result in a reduction of wages and conditions. For example, orders were refused where the current employer had taken over the business and wanted the relevant federal award to apply instead of AWAs. The award provided inferior conditions to the AWAs. Here, the employer had refused to negotiate with the employees at all. On the other hand, termination was granted to an employee in the face of employer opposition, because she wished to be covered by the relevant State ‘award/enterprise agreement’ which provided a lower base rate, but otherwise some better conditions than the AWA. In s 170VM cases, the commission’s construction of the public interest favours an individual employee who prefers to be covered by a collective industrial instrument rather than an expired AWA. Perhaps paradoxically, though, the commission has declined to give directions in conciliation about bargaining that could really counter employer resistance to union involvement.

**Strategies to obtain s 170NA orders and directions in conciliation about bargaining**

Unions and employers seek orders and directions in conciliation about bargaining. While s 170MZ forbids the commission arbitrating on matters at issue between the parties during a bargaining period, s 170NA(1) provides that it has the same conciliation powers in respect of matters arising under Pt VIB (Certified Agreements) as it does under Pt VI (Dispute Prevention and Settlement) in relation to industrial disputes. In the exercise of these powers,
the commission may issue procedural directions and recommendations under ss 111(1)(d) and (t). Section 111(1)(d) provides that the commission may ‘give a direction in the course of, or for the purposes of the hearing or determination of an industrial dispute’. Section 111(1)(t) provides that the commission may ‘give all such directions, and do all such things as are necessary or expedient for the speedy and just hearing and determination of the industrial dispute’.

The limits of the power to issue directions were at issue in the hotly contested bargaining dispute between the Commonwealth and Public Sector Union (the CPSU) and Sensis Pty Ltd, which refused to entertain negotiations with the union, preferring a non-union CA. The CPSU, which claimed ‘significant membership’ at Sensis, initiated a bargaining period, but Sensis refused to negotiate with it. The CPSU then sought s 170NA conciliation by the commission and asked the tribunal to issue a direction that the union be present during future negotiations between Sensis and the bargaining committee Sensis had established. Sensis argued that the commission’s jurisdiction did not extend to the making of such orders. Smith C held at first instance:

The CPSU correctly, in my view, argued that bargaining is not unregulated but must be conducted according to law and the duty to bargain in good faith forms part of the matrix of obligations placed upon parties seeking to pursue agreements under Pt VIB of the Act.

The commissioner implicitly equated the notions of bargaining in good faith and genuinely trying to reach an agreement, and decided that he had the jurisdiction to make the directions sought. In allowing the appeal, a Full Bench held that there was no ‘legal’ duty to bargain in good faith in the WR Act. However, the bench thought that it may be legitimate for the commission to take into account whether a party was bargaining in good faith in the exercise of its discretion in giving directions. It was within the commission’s jurisdiction to give orders about the bargaining process, but directions which would ‘deprive a party of a right to pursue its preferred form of agreement’ would be likely to ‘go beyond what might be legitimately directed’. The Full Bench’s justification was that the WR Act required it to act with neutrality. However, its decision implicitly supported Sensis regarding the employer’s ‘right’ to pursue a non-union agreement. Perhaps the ‘right’ the union and its members had in pursuing their preferred form of agreement seemed less worthy of protection. In the event, the Full Bench did not even mention it. The bench returned the matter to Smith C to be dealt with in accordance with its rather confusing decision.

An almost comical distinction between acceptable and unacceptable procedural orders is apparent in Jet Care Pty Ltd and the Australian Licensed

44 Commonwealth and Public Sector Union v Telstra Corporation Ltd (unreported, AIRC, Print S7179, 20 June 2000).

45 Community and Public Service Union and Sensis Pty Ltd (unreported, AIRC, Smith C, Print PR930269, 10 April 2003). The commissioner found himself ‘fortified’ in this conclusion by the terms of s 170MP(1)(b), 2(b) and 3(c) and s 170MW(2)(b).

46 Section 45 Appeal against decision issued by commissioner Smith on 10 April 2003, PR930269 (2003) 128 IR 92.
Aircraft Engineers Association. Here Richards C was asked to make ‘consent recommendations’ proposed by the parties themselves to assist them in negotiating a new CA. The commissioner was prepared to adopt the parties’ proposals as recommendations, apart from the clause saying that the parties were committed to bargaining in good faith. The position now is that even if a commissioner accepts that there is an implicit duty to bargain in good faith, the commissioner cannot compel its performance by way of a direction made in conciliation proceedings. The most the commission can do in conciliation about bargaining is take a failure to negotiate fairly into account in the exercise of its very limited discretion to make procedural orders.

Strategies to prevent certification of non-union agreements

The availability of non-union CAs pursuant to s 170LK (LK agreements) has posed difficulties for unions faced with an employer who simply refuses to recognise them for negotiating purposes. Unions have in some cases been able to convince the commission not to certify an LK agreement on the basis that it did not comply with one or more of a number of requirements in ss 170LK and 170LT, thus buying the union time to shore up its support at the workplace and force the employer to the negotiating table. If any of the s 170LK requirements are not complied with, an application for certification will be invalid, while if the commission is not satisfied that the s 170LT requirements are met, it must not certify the agreement.Chief amongst the requirements for present purposes is that a valid majority of persons employed at the time and whose employment would be covered by the CA must have genuinely made it.

Section 170LE somewhat confusingly provides that a valid majority will have genuinely made an (LK) agreement if the employer gives the employees a reasonable opportunity to decide whether they want to, and either a majority so decide, or a majority of persons who cast a valid vote so decide. The employer must ensure that the employees have 14 days’ notice of the intention to make the LK agreement, that they have ready access to it and must take reasonable steps to ensure that it is explained to them.

Unions seeking remedies to force compliance are faced first with procedural problems. Standing in certification proceedings by unions who are not parties to the LK agreement in question is only granted where an employee the agreement would cover has requested the union to meet and confer with the employer about it pursuant to ss 170LK(4) and (5). However, a union aggrieved by a decision to certify may also appeal the decision on jurisdictional grounds even if it is not bound and no request to meet and confer.

47 Jet Care Pty Ltd and the Australian Licenced Aircraft Engineers Association (unreported, AIRC, Richards C, Print PR934761, 15 July 2003).
49 Section 170LT(6).
50 Sections 170LK(2), (3) and (7).
51 Section 43(2). The request must be made prior to the conclusion of any ballot on the agreement: Re National Wine Centre Certified Agreement (unreported, AIRC, Hampton DP, PR910912, 8 November 2001) at [13].
has been made by a member.\textsuperscript{52} Finally, an employee who would be bound by the proposed LK agreement may appear and oppose its certification, effectively allowing the union’s voice to be heard where the employee is a member.\textsuperscript{53}

In cases where unions have managed to overcome these hurdles, the court and the commission have both expressed the significance of the concept of the valid majority. Faced with a certified LK agreement purportedly made with persons who have not yet actually started work, the court held that the concept of a valid majority genuinely making an agreement ‘plainly betokens a concern with the authenticity and, as it were, the moral authority of the agreement’ and that in the context of the objects of the WR Act it was ‘plainly necessary (that) this be so’.\textsuperscript{54} In this case, the court issued a declaration that the certification order was invalid because the workers concerned were not ‘employees at the time’, but shortly thereafter the commission certified an identical LK agreement genuinely made with employees who had by then commenced work.\textsuperscript{55} Similarly, while unions have had some success in the commission in showing that an LK agreement was not genuinely made, and these decisions reveal that there was very little if any actual bargaining with employees at all, let alone bargaining in good faith, they do not actually require the employer to do so.\textsuperscript{56}

Taken together, the s 170LK and s 170LT requirements are encapsulated in the notion of bargaining in good faith, but essentially only require that the proposed agreements be given to employees, explained to them and that they have a reasonable opportunity to read them before making their decision. An employer must meet and confer with the union if an employee so requests, but this does not require actual bargaining. Further, while refusal to certify may result in the employer then taking the necessary procedural steps to demonstrate compliance, ultimately the LK agreement is just as likely to be subsequently re-submitted and certified without any good faith bargaining actually taking place.\textsuperscript{57} In some cases, the opposing union has convinced the

\textsuperscript{52} Section 45(1)(g).
\textsuperscript{54} Re Australian Industrial Relations Commission; Ex Parte Construction, Forestry and Mining Energy Union (1999) 93 FCR 317; 164 ALR 73 at [126] per Wilcox and Madgwick JJ. Finkelstein J later took a similar view to Wilcox and Madgwick JJ, but refused an interlocutory injunction to prevent the commission certifying a CA negotiated with the union, saying that the merits should be argued before the commission, if necessary by an employee represented by legal counsel: National Union of Workers v Qenos [2000] FCA 1340 (unreported, 21 December 2000, BC200008292) at [24]–[26].
\textsuperscript{56} See, eg, Re Application for Certification of Suncorp/GIOA General; Insurance Business Integration Agreement 2002 (unreported, AIRC, Duncan DP, Print PR929388, 25 March 2003); Re s 170LK application for certification of agreement re Coles Myer Pty Ltd (unreported, AIRC, Whelan C, Print R3504, 31 March 1999); Shop Distributive and Allied Employees Association, Re Mobile Food Vans Enterprise Agreement [1998] (unreported, AIRC, Macbean SDP, Harrison, SDP, Redmond, C, Print R4468, 6 May 1999).
\textsuperscript{57} For example, see the Gordonstone dispute, above n 55.
commission to refuse certification unless the employer agreed to undertakings to substantially improve the conditions the LK agreement contained. Nevertheless, the strategy to prevent certification is difficult and costly to put into place and does not often yield fruitful remedies.

Strategies to obtain orders to terminate a bargaining period because a party is not genuinely trying to reach agreement

Section 170MW(1) empowers the commission to suspend or terminate a bargaining period in the circumstances prescribed after giving the negotiating parties an opportunity to be heard. The immediate effect of such an order is that protected industrial action loses protection from sanction. It thus has the same effect as a court injunction that industrial action cease or not occur: it substantially shifts the balance of power in the employer’s favour. The power is a discretionary one and most applications are made by employers. For the purposes of this article, only two circumstances in which a bargaining period may be terminated or suspended are relevant. The first circumstance, pursuant to s 170MW(2), is where a negotiating party is organising or taking, or has organised or taken, industrial action to support claims in respect of the proposed agreement, but is not genuinely trying to reach agreement. The second circumstance, pursuant to s 170MW(3), is where industrial action is being taken that is likely to harm the population or a part of it or the economy or a part of it.

Section 170MX provides that if an order is made on s 170MW(3) grounds, the commission must then try to facilitate agreement by conciliation, but if that is not successful, then a Full Bench must, if it considers it appropriate, exercise arbitration powers and make an award. In employer applications relying on s 170MW(3) circumstances, the commission has shown a distinct willingness to make orders where the industrial action is virtually industry wide, such as in construction and metals during Campaign 2000 and in the Queensland Public Hospital Nurses dispute in 2002. That said, however, even the bargaining period at Wollongong University was terminated on s 170MW(3) grounds, because McIntyre VP accepted submissions that the protected industrial action planned (withholding student results) threatened to harm ‘that part of the population that is constituted by the graduating students

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58 See, eg, Re Clive Peeters Certified Agreement (unreported, AIRC, Watson SDP, PR951401, 27 August 2004). The agreement was subsequently certified on 10 September 2004.

59 Section 170MW(2) provides that a bargaining period may be terminated or suspended where a negotiating party has taken industrial action to advance claims being made, and did so either before genuinely trying to reach agreement (s 170MW(2)(a)), or is not genuinely trying to reach agreement (s 170MW(2)(b)) or failed to comply with a direction of the commission (s 170MW(2)(c)) or a recommendation of the commission under s 111AA.

60 Section 170MW(3) provides that a bargaining period may be terminated or suspended where industrial action is being taken to advance claims in respect of the proposed agreement that is threatening to endanger the life, personal safety or health or the welfare of the population or of part of it, or to cause significant damage to the Australian economy or a part of it.

61 See, eg, Abigroup Contractors Pty Ltd and CFMEU (unreported, AIRC, Merriman C, Print S4379, 22 March 2000).
of the university’. Although the discretion to make the order is broad, the reasoning in these cases suggests that establishing s 170MW(3) circumstances are fairly straightforward for an employer, even where the industrial action is protected and especially if it is sector or industry wide.

Where a bargaining period is terminated on s 170MW(2) grounds, the WR Act does not require the commission to then conciliate or arbitrate (if appropriate) on the matters at issue between the parties. Thus, a termination order on s 170MW(2) grounds has an even more severe effect on union strategy, especially if it is coupled with a declaration under s 170MW(10). This latter section gives the commission power to make declarations that a negotiating party or employee is not permitted to initiate a new bargaining period for a specified length of time. In s 170MW(2) cases, the definition of ‘genuinely tried to reach agreement’ has proved crucial, and is treated as being virtually interchangeable with bargaining in good faith. The commission retains the position it adopted under the IR Act that the phrase does not require a party to actually make concessions in bargaining to show that it is genuinely trying to reach agreement. For example, in a 2003 decision, Dangerfield C refused an employer’s application to terminate a bargaining period, and adopted a 1994 decision by Hancock SDP, concluding that:

bargaining in good faith does not require optimism that an agreement can be reached or belief that an agreement will be reached, but it does require a preparedness to engage the other side seriously and meaningfully and to take account of their arguments.

The meaning of the phrase has been most important where the employer is seeking to stymie alleged pattern bargaining by unions. In Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, the AIG argued that pattern bargaining by unions demonstrated almost by definition that they were not genuinely trying to reach agreement. This case concerned Campaign 2000 and the application was for the termination of 33 bargaining periods with 33 employers. The AIG argued that s 170MW(2)(a), (b) and (c) circumstances existed, because in taking an ‘all or none’ approach, the unions were not bargaining in good faith. They said that the unions wanted to reach the same CA with all the employers and had not complied with directions and recommendations of the commission. The AIG submitted that this demonstrated that the unions were not genuinely trying to reach agreement. The unions’ major tactic was to take selective protected action. To avoid commission directions in s 170NA conciliation, they would then inform employers that they no longer wished to reach a CA, thus terminating the bargaining period. They then initiated new bargaining

62 University of Wollongong v NTEU (unreported, AIRC, McIntyre VP, Print S1688, 7 December 1999).
63 Although note the comments of the Full Bench of the AIRC in Sensis Pty Ltd v CPSU (2003) 128 IR 92 at 98–9.
64 Southlink Pty Ltd and TWU (unreported, AIRC, Dangerfield C, Print PR935563, 31 July 2003).
periods and took further protected action. There were also several instances of alleged unprotected industrial action at some sites.

Apart from the unprotected action, the WR Act permitted this tactic. Yet Munro J was faced with what seems to have been deadlocked negotiations and very effective industrial tactics by the unions. His Honour held that s 170MW(2)(b) required that the unions must genuinely try to reach agreement with each employer as an individual employer. He thought the ‘all or none’ pattern bargaining approach would fail that test if it meant that no variations were permitted between CAs in an industry, as was alleged to be the case by the AIG. Further, his Honour took a rather restrictive approach to the construction of the WR Act, reaching the conclusion that in notifying employers that they no longer wished to reach an agreement, the unions were by their own admission not genuinely trying to reach an agreement with the employer notified. His Honour agreed that the AMWU in particular had not complied with commission recommendations and directions. He terminated all the bargaining periods, even though technically speaking some of them had already been terminated by the unions themselves in order to avoid such orders. The orders also prohibited the initiation of a new bargaining period in relation to any of the matters specified in the original notices initiating the terminated bargaining periods. In a later case, involving the Media, Entertainment and Arts Alliance, a Full Bench approved Munro J’s attitude regarding pattern bargaining.66

A more recent decision concerning Campaign 2003 demonstrates a preparedness to suspend a bargaining period because notices of an intention to take protected industrial action were given before ‘sufficient’ negotiations had taken place. The union’s evidence was that an organiser had been unable to organise negotiation meetings, but that shop stewards had held several meetings with the employer. Hingley C described the latter meetings as merely ‘general discussions’, and concluded that the notices to take protected industrial action were ‘premature and precipitous’, showing that the AMWU had not genuinely tried to reach an agreement before taking protected action. He suspended the bargaining period for 14 days.67

These decisions show a willingness to employ the s 170MW(2) order to stop even protected industrial action during bargaining periods and thus circumscribe union bargaining power. In s 170MW(2) cases, the commission draws a fine line between robust bargaining and not genuinely trying to reach agreement, a line that tends to be drawn in favour of employers if unions are employing unusually effective tactics, especially industrial action, and even if it is protected. Such an outcome is at best illogical, since the whole point of most union bargaining tactics, including those in Campaigns 2000 and 2003, is to secure an agreement with employers. Nor does this outcome fit easily with the objectives of the WR Act, especially the objective in s 3(c) of ‘enabling employers and employees to choose the most appropriate form of

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66 Section 45 Appeal Media, Entertainment and Arts Alliance re s 127 Orders (2003) 123 IR 326.
67 Section 170MW Application for termination of a bargaining period; Kempe International and Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (unreported, AIRC, Hingley Cr, PR931027, 5 May 2003).
agreement for their particular circumstances, whether or not that form is provided for by this Act’. The Coalition Government and peak employer organisations remain committed to abolishing pattern bargaining by unions, especially sector wide protected industrial action. Although the Senate substantially altered the original Bill, the Workplace Relations Amendment (Genuine Bargaining) Act 2002 (Cth) strengthened the commission’s power to order restrictions on the commencement of new bargaining periods, and added an addendum to s 170MW(2):

The issue of whether or not a negotiating party is genuinely trying to reach agreement with the other negotiating parties was considered by Justice Munro in Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, Print T1982.

Presumably, this is intended to warn unions of the perils of robust bargaining from a position of strength to achieve sector wide wages and conditions. Unions have responded by ensuring that while there may be certain core claims that must be achieved at all worksites, there is also some latitude for difference between final agreements, thus avoiding the AIG outcome. Nevertheless, the s 170MW(2) order has emerged as a useful employer tool to stop and prevent industry or sector wide protected industrial action. This paucity of appropriate arbitral remedies for unions struggling against unfair bargaining practices by employers is mirrored in the construction of curial remedies for duress and coercion.

**Duress, Coercion and Notion of Fairness in Bargaining**

An overview of the provisions

Section 170NC prohibits a person from taking any industrial or other action, or refraining from taking such action, with intent to coerce another person to agree or not agree to making, varying, terminating or extending the nominal expiry date of a CA. The prohibition does not apply to protected action (s 170NC(2)). Section 170NC is a penalty section, attracting injunctions and fines from the court of up to $33,000 (formerly $10,000) for corporations.68

The prohibition on duress is expressed in significantly different terms. Section 170WG(1) provides that ‘a person must not apply duress to an employer or employee in connection with an AWA or ancillary document’. Section 170WG(2) prohibits a person knowingly making a false or misleading statement to another person with the intention of persuading the other person to make or not to make an AWA. Further, s 170WF(1) prohibits a person not a party to negotiations relating to an AWA from using threats or intimidation with the intention of hindering the negotiations or the making of the AWA. However, s 170WF(2) provides that subs (1) does not apply to conduct of a union for the purpose of negotiating a CA. These sections are enforceable in

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68 Penalties in the WR Act were increased threefold in June 2004 by the Workplace Relations Amendment (Codifying Contempt Offences) Act 2004 (Cth).
the same way as s 170NC, and attract the same penalty and injunctive relief. The Federal Court has construed the concepts of coercion prohibited by s 170NC and duress prohibited by s 170WG as being broadly identical. In the course of the several years it took to reach this position, the court made little if any direct reference to bargaining in good faith, and yet the tenor of its decisions reflects notions of fair and unconscionable behaviour. In this part of the article, the broader operation of s 170NC is juxtaposed with the operation of s 170WG.

Duress cases are mounted exclusively by employees and unions, usually to counter individualisation strategies by employers, and the key issues usually concern whether making an offer of employment dependent on signing an AWA breaches s 170WG. The duties of the Employment Advocate (the EA) include investigating alleged breaches of Pt VID of the WR Act and other complaints regarding AWAs, and providing free legal representation to a party in a proceeding under Pt VID, but there do not appear to be any reported duress cases initiated by the EA, and no mention of such cases in the EA’s Annual Reports. In practice, proving duress has turned out to be a lengthy and difficult process and only rarely have the remedies been even remotely useful for successful applicants.

In contrast, employers, the EA and the Building Industry Task Force (the BIT) commence the majority of s 170NC actions, finding coercion easy to establish and s 170NC remedies a very useful adjunct to employer collective bargaining and individualisation tactics. The key issues usually concern alleged ‘unprotected’ industrial action or alleged bullying behaviour by individual union members or officers. As far as the courts are concerned, industrial action that is not protected, even if only for a technical or procedural reason, by definition amounts to coercion in breach of s 170NC and attracts the related remedies of injunctions and fines, not to mention the remedies available at common law, s 127 orders and sometimes remedies under the Trade Practices Act 1974 (Cth). Unions successfully obtained interlocutory relief in several early s 170NC cases by creatively framing the employer’s tactics during collective bargaining to fit early conceptions of coercion. That avenue appears to have been virtually closed off, however, following more considered discussions of the section in cases that went to final hearing. On the whole, the court has difficulty accepting the idea that an employer intends to apply duress or coercion, compared to the ease with which it accepts that union conduct shows the required coercive characteristics.

Duress

The substantive rules regarding duress have been comprehensively analysed by several scholars. The focus here is on the key strategic and remedial factors surrounding it. Although employers argued that the meaning of duress

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69 Sections 170VV and 170VZ.
70 Section 83BB(1).
72 In particular, see J C Tham, “‘Take it or Leave it’ AWAs: A Question of Duress” (1999) 12
in commercial law should be adopted in cases under the WR Act, the court has adopted only selected aspects. As Tham persuasively argued in his analysis of the first duress case, *ASU v Electrix*, importing the general law definitions of duress to industrial relations conduct can be inappropriate because it downplays the significance of industrial relations or work-related factors. Nevertheless, commercial notions to some extent underpin the court’s current position on the meaning of duress. It is now accepted that to prove duress, the applicant must show that the respondent has applied illegitimate pressure in the sense that it is unconscionable or unlawful, that conduct was engaged in that might result in ‘illusory or not real negotiation or bargaining’ and that the respondent intended to apply duress of this kind. In duress cases, the court is thus directly concerned with whether bargaining was illusory and whether illegitimate pressure was applied in the bargaining (if any) that might take place between the parties: key aspects of the concept of bargaining in good faith discussed earlier in this article. The cases largely concern ‘take it or leave it’ offers of AWAs. Such an offer to an existing employee covered by an award or collective agreement is more likely to amount to duress than an offer to a new employee, depending on the particular circumstances of the case, including the extent of unemployment in the local region. Thus, the court draws a fine line in law, whereas in the real world genuine bargaining was obviously illusory in each and every case because the employer was not open to any negotiation at all.

The first duress case, *ASU v Electrix*, concerned a transmission of business. The incoming employer told the ASU that if the previous employer’s employees did not sign the AWA being offered to them ‘they won’t get a job’. Marshall J agreed that there was a serious issue to be tried whether Electrix had contravened s 170WG by applying duress, and granted the interim injunction. His Honour famously held that in saying it’s the AWA or your job, ‘the company’s behaviour was unconscionable conduct which no employee in a humane, tolerant and egalitarian society should have to suffer’. His Honour discounted the explanatory memorandum accompanying s 170WG(1) which stated that offering employment on the basis that an employee enter into an AWA would not breach the section, saying it should not be used to contradict an otherwise unambiguous section of the WR Act. The context of the alleged duress is crucial, and in this case included the regional unemployment rate and the specialist, non-transferable skills of the workers. On the balance of convenience, Marshall J held that compensation would not be adequate to compensate for the stigma of unemployment, especially for the large number of meter readers who resided in depressed areas of Victoria. This matter did not go to final hearing, the parties eventually reaching a settlement where the employer entered a certified agreement.

Although unions were also successful in a similar battle with the

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73 *ASU v Electrix Pty Ltd* (1999) 93 IR 43.
74 See Tham, above n 72.
76 *ASU v Electrix* (1999) 93 IR 43 at [15].
77 Creighton and Stewart, above n 8, p 180 n 335.
Commonwealth Government in what has become known as the Schanka litigation, that particular matter took three years to complete and the remedy gained was ultimately ineffective. The Schanka litigation arose out of the Federal Government’s decision to privatise or outsource most of the work of the Commonwealth Employment Service (CES) and Employment Assistance Australia to, amongst others, Employment National Ltd (EN) and Employment National Administration Pty Ltd (ENA). A condition of transfer to the new employers was that employees had to sign an AWA. Four CES employees made applicants to the Federal Court on a representative basis alleging that there had been duress. They had all been told that they had to sign an AWA or the offer of work would be withdrawn. Three signed the AWAs and started work, but one did not and declined the offer of employment. The orders sought were a declaration that ENA had contravened s 170WG(1), a penalty and an order declaring the AWAs entered into between the employees and ENA were void. In one of the first decisions in this dispute, Schanka v Employment National (Administration) Pty Ltd,79 the court held that it was doubtful that simply offering employment on the basis that an AWA in certain terms must be made is illegitimate pressure. There must be something more, in that it must be pressure that is likely to have the effect of denying the exercise of free will if an AWA was made and it must also be intended to have that effect. Furthermore, the court held the duress could take place before an AWA is made and whether or not the AWA is ultimately actually agreed to by the employee.

An appeal from this decision was rejected by the Full Federal Court.80 The court concluded that ENA had a deliberate policy which denied the applicants any opportunity to negotiate: they had to accept the AWA conditions or not be employed, even though they would be doing exactly the same work as they had previously done for the government. Several decisions about procedural issues followed, including the adequacy of pleadings, so that the final hearings did not finish until February 2001 and the final decision was not handed down until 18 May 2001, three years after the AWAs were first offered as a condition of employment. The Full Court also held that the evidence established that ENA applied duress, but only to the four applicants. Hence, the findings could not be extended to all the people offered AWAs: each individual instance had to be examined. Further, the Full Court held that it did not have the power to declare the AWAs entered into void, even though duress had been applied. In the end, the only remedy achieved was a $10,000 penalty, which although the court ordered that it be paid to the union would not have met the extra legal costs the union had incurred.

The decision which virtually abolished the usefulness of s 170WG for prospective employees trying to avoid having to sign an AWA was Burnie Port Corporation Pty Ltd v Maritime Union of Australia.81 It also limited the usefulness of the section as a tactical weapon for unions battling

78 McCrystal and Grossi, above n 72, have provided a thorough analysis of the legal principles to emerge from the Schanka litigation.
80 Employment National (Australia) Pty Ltd v Schanka (2000) 97 FCR 186; 170 ALR 42.
individualisation strategies. Negotiations for a new collective agreement with the union commenced in December 1998. At the third meeting on 10 August 1999, the employer’s representative dismissed the union’s claims as laughable and added that by Christmas the employees would all have signed AWAs because of the union’s failure to represent them. Since April 1999, the employer had been offering employment pursuant to AWAs to all its current employees, with a payment of $4000 offered to forego the benefits under the current collective agreement. Five full time employees had signed. In August 1999, the corporation interviewed a number of candidates for two vacant positions, stipulating to every candidate that a condition of their employment was that they enter into an AWA before commencing employment. AWAs or one of two CAs covered other employees of the corporation. One of the six candidates for the two available positions, a Mr Rolls, refused to enter into an AWA and was ultimately unsuccessful in his application. The two successful candidates did sign AWAs. The union argued that the offer amounted to duress, and breached the freedom of association provisions and sought penalties and an interim injunction.

Although the court found at first instance that there was a serious issue to be tried, and that the balance of convenience was evenly balanced, it declined to grant the injunction because it was able to hear the matter quickly and the employer undertook to give seven days notice of any intention to interview any further persons. This matter went to final hearing in October 1999, but the decision was not handed down until August 2000. The court decided that parliament did not intend that making employment conditional upon acceptance of an AWA would amount to duress, that here there was no positive conduct other than offering employment conditional upon acceptance of the AWA, and this did not amount to duress. On the other hand, the union was successful in regard to its claim that the corporation had refused, in breach of s 298K(1), to employ Mr Rolls because he was entitled to the benefit of an industrial instrument. The court made a declaration and sought submissions on the appropriate penalty, but neither of these remedies saw the employer have to bargain fairly or to employ Mr Rolls.

Duress is thus difficult to prove. Moreover, cases concerning duress are likely to be lengthy and expensive to mount, and efficacious remedies elusive. A similar pattern can be observed with respect to union applications for s 170NC remedies.

Coercion

Unions made some early successful strategic use of the injunctive remedy for breach of s 170NC with a view to enforcing a species of good faith bargaining. Section 170NC enjoyed a short lived role in the anti-suit injunction tactic used by unions to prevent employers pursuing industrial tort injunctions in State courts to stop protected industrial action. Apart from the anti-suit cases, unions obtained interim injunctions to stop or prevent a breach of the section to counter employer threats to contract out work. They also obtained an

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82 See the discussion by V de Felice, ‘Stopping and Preventing Industrial Action’ (2000) MULR 310.

83 Australian Liquor, Hospitality and Miscellaneous Workers Union v Coca-Cola Amatil (Aust)
interim injunction where the employer made a technical error in fulfilling all the requirements to ensure a lockout was protected\textsuperscript{84} and to stop the offer of AWAs in the context of deadlocked bargaining for a CA.\textsuperscript{85}

The early interlocutory decisions implied that the reach of s 170NC was very wide, and it was not until 2000 that a case was decided on other than an interim basis and the reach of the section confined.\textsuperscript{86} Decisions made in final proceedings have restricted the construction of s 170NC in ways that limit its usefulness for unions seeking injunctive relief as part of their industrial relations strategies. The restrictive approach commenced with H\textsuperscript{a}n\textsuperscript{ley} v AFMEPKIU, where a union officer threatened to ban a company from a construction site unless its officers signed a standard certified agreement.\textsuperscript{87}

In an appeal from the Magistrate’s Court penalty decision in the latter part of 2000, a Full Federal Court decided that the WR Act contemplated ‘free bargaining’ between the parties, allowing industrial action to take place only in prescribed circumstances. To make out a breach of s 170NC, the court decided that an applicant must show that the respondent had an intention to coerce the applicant as one of the objectives of the conduct. However, it did not matter if the conduct had other objectives besides coercion. The key point as far as the court was concerned was that it was ‘consistent with the purposes of Pt VIB to treat s 170NC as proscribing conduct which might result in an agreement which is not the product of free bargaining’.\textsuperscript{88}

Shortly after this decision, Gyles J heard an application by the Commonwealth Bank for interim anti-suit orders that would have had the effect of prohibiting the Finance Sector Union proceeding with an action in the court for an interpretation of an agreement. The bank agreed that the union’s application was in itself coercion prohibited by s 170NC, basing its view on

\textsuperscript{84} Textile Clothing and Footwear Union of Australia v Geelong Wool Combing Ltd [2003] FCA 413 (unreported, 5 May 2003, BC200302102).
\textsuperscript{85} In Finance Sector Union v Commonwealth Bank of Australia (2000) 106 IR 139, the bank offered AWAs when bargaining for a new CA deadlocked. The union successfully argued that there was a serious question to be tried that the offer was coercion in breach of s 170NC to force the union to enter the CA on particular terms. Finkelstein J in the Federal Court accepted the union-led evidence that the offer and acceptance of individual agreements was likely to result in union members resigning their membership. Other documentary evidence showed a long-term plan by the bank to eventually move all employees to individual agreements. His Honour decided that there was a sufficiently arguable case that the bank sought to coerce the union into entering a new CA by inducing its employees to leave the union by offering them AWAs. As to the balance of convenience, at [56], Finkelstein J agreed with the union that if the bank was permitted to continue, ‘it is difficult to see how the union would be able to recover its position, at least in the short term’.
\textsuperscript{86} Han\textsuperscript{ley} v AFMEPKIU (2000) 100 FCR 530; 182 ALR 563.
\textsuperscript{87} Ibid.
\textsuperscript{88} Ibid.
the anti-suit line of cases. Gyles J decided that interlocutory proceedings were ‘inherently unsatisfactory in this field’ since the construction of s 170NC had not been settled. His Honour added that applicants ‘obtain undue advantage (both tactical and otherwise) in ways which may not all be perceived by judges granting the injunction’, and further that this may be wasteful of the court’s time and resources. He fixed an early date for the final hearing of the matter and engaged in an inquiry as to the proper construction of s 170NC, considering all the previous interlocutory decisions and the decisions in duress cases. His Honour specifically adopted the court’s construction of duress offered in relation to AWAs in the Schanka litigation, holding that there was no material distinction between coercion and duress. He emphasised that in order to amount to coercion, the conduct had to be unlawful, unconscionable or illegitimate. It was a short step to finding that if the conduct was permitted by law, and was not an abuse of process, it would only rarely be unlawful, unconscionable or illegitimate. In reaching this conclusion, Gyles J distinguished the anti-suit cases, without specifically finding them to have been wrongly decided.

The test is now very difficult for unions to satisfy. For example, in an attempt to influence government higher education funding rules and to avoid AWAs, the National Tertiary Education Union sought a penalty for breach of s 170NC against the Commonwealth of Australia and the Minister for Employment, Education, Training and Youth Affairs. The funding rules linked a percentage of funding to ‘workplace reform’ criteria, such as reaching CAs that permitted the offer of AWAs and other ways of individualising the work relationship. The union claimed that the respondents acted ‘with intent to coerce’ higher education institutions engaged in negotiations for CAs by making funding contingent on compliance with the criteria in a context of generally reduced real funding over a number of years. Weinberg J held that the words ‘intent to coerce’ meant intent to negate choice, and that the funding rules did not do this, but only operated as an incentive to the institutions. His Honour was also of the view that even if there was an intention to coerce, it was not illegitimate or unconscionable. In practice, however, the funding rules did inhibit free and fair bargaining: whether a university wanted to offer AWAs or not, it had to demand that this right be included in its CA with the union (or its employees) or forego significant funding.

Union attempts to establish that a lockout is coercion because the employer’s refusal to disclose information showed a failure to genuinely try to reach agreement have also failed. Section 170MP(3) provides that a lockout is not protected if the employer has not first genuinely tried to reach agreement. In Australian Meat Industry Employees’ Union v G & K O’Connor Pty Ltd, the union argued that the seeking of substantial cuts in wages and conditions in a new CA without being prepared to disclose details about its profits before imposing the lockout showed that O’Connor was not genuinely trying to reach

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90 Ibid, at [40].
92 Ibid, at [112]–[116].
agreement. Marshall J disagreed, even though such disclosure ‘may assist the resolution of the dispute between it and the union’. His Honour adopted the statement by Hancock SDP in 1994 that bargaining in good faith did not require moderation in demands, but that it did imply a preparedness to consider offers seriously and the adoption of a hard line might indicate an intention to obstruct agreement, adding that he ‘presently (saw) no material distinction between the concept of bargaining in good faith and the concept of a genuine attempt to reach agreement’. However, Marshall J said there was nothing to indicate that the union’s opposition was not considered seriously by the employer. He found that the union had established only a weak case that there was a serious question to be tried and that the fact that employees would be deprived of income only gave the union a slight edge on the balance of convenience and refused injunctive relief.

Marshall J indicated that his decision was not meant to be taken as approving the employer’s tactics, but stemmed from the court’s view of the legality of the company’s actions and not the morality of its ‘extravagant demands’. There can be little doubt though that the conduct of the employer did not accord with the concept of bargaining in good faith.

It is certainly open for the court to conclude that a failure to bargain in good faith or a failure to genuinely try to reach agreement amounts to coercion. However, the requirement that the pressure be unlawful, illegitimate or unconscionable presents a barrier to the kind of interim orders that issued in earlier years to stop employers from offering AWOAs or even outsourcing. Such employer conduct is now rarely regarded by the courts as unlawful, illegitimate or unconscionable because they are able to conclude that such conduct is permitted by the WR Act itself or the law more generally. For example, in spite of the Commonwealth Bank decision in 2000, by 2002 a serious question to be tried could not be sustained that pursuing a non-union certified agreement when negotiations for a union agreement deadlocked over one claim amounted to coercion.

In contrast, employers, the EA and the BIT have enjoyed considerable success in s 170NC actions, usually seeking interlocutory relief to stop alleged ‘unprotected’ industrial action or penalties for coercive pressure tactics by individual union officers, such as the threats made by the union officer in

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93 Australian Meat Industry Employees’ Union v G & K O’Connor Pty Ltd (1999) 91 IR 356. See also Australian Air Flight Engineers Association v Ansett (2000) 102 IR 162, where Merkel J rejected the union’s submission that Ansett had not genuinely sought to reach agreement, without explaining why he reached this decision.

94 G & K O’Connor Ltd, above n 93, at 361.

95 In Re Australian Rail, Tram and Bus Industry Union (unreported, AIRC, Print L5622, 30 September 1994).

96 Above n 93, at 362.

97 Ibid, at 368.

98 Ibid.


100 For example, interim injunctions were issued to stop picketing in Cadbury Schweppes Pty Ltd v Australian Liquor, Hospitality and Miscellaneous Workers’ Union (2000) 106 FCR 148; 185 ALR 480 and Amcor Packaging (Australia) Pty Ltd v AFMEPKIU (2002) FCA 127 (unreported, 20 February 2002, BC200200395) and to stop ‘unprotected’ action in St John’s Ambulance Australia WA Ambulance Service Inc v ALHMWU (2002) 117 IR 179.
Cases are always successful if the evidence shows that union officers have threatened employers of dire consequences if they do not sign the ‘going industry agreement’. The remedy usually sought in such cases is the imposition of a penalty. In cases of wider significance, such as the bargaining fee issue in Electrolux Home Products Pty Ltd v Australian Workers Union, employers are likely (also) to seek declaratory relief.

In the ‘unprotected’ industrial action cases, the employer’s success often springs from the overly technical approach used by the court to determine whether the industrial action is protected. However, this technical approach backfired in an unusual case concerning the tactical use of the protected action provisions by two unions in the Queensland coal industry. In Anglo Coal (Capcorp Management) Pty Ltd, Cooper J summarised the unions’ conduct as follows:

Between 17 July 2003 and 16 September 2003, the first respondent [CFMEU] served on the applicant [employer] 132 notices of intention to take industrial action in purported reliance on s 170MO of the Act. In respect of forty-nine percent of the notices given, the foreshadowed industrial action did not take place. Between 18 July 2003 and 16 September 2003, the second respondent served upon the applicant 114 notices purporting to be given under s 170MO of the Act. In respect of fifty-eight percent of these notices, the foreshadowed industrial action did not occur.

Notices were apparently served on a daily basis, but the industrial action referred to in the notices was not always taken. The effect of this tactic was that the employer, Anglo Coal, did not know whether the industrial action would actually occur on any given day. They argued that this caused them to suffer economic damage, because they failed to take defensive action on some occasions when the industrial action did take place. Anglo claimed that the s 170MO notices of intention to take industrial action were issued for an improper purpose if the industrial action flagged by the notices did not occur. Thus, if no subsequent industrial action as notified was ultimately taken, the issuing of the notices amounted to coercion prohibited by s 170NC. They sought an interim injunction to stop the practice and also penalties for alleged contravention of s 170NC. Cooper J rigorously applied the three parts of the test described above. He found that there was no evidence that in giving the s 170MO notices the unions intended to coerce Anglo Coal, and that such an intention could not be inferred from the circumstances. His Honour held that:

1 Hanley v AFMEPKIU, above n 86. See also Laing v CFMEU [2003] FCA 1018 (unreported, 24 September 2003, BC200305568).


4 See, eg, David’s Distribution Pty Ltd v National Union of Workers (1999) 91 FCR 463; 165 ALR 550 at [87]–[88]. The Supreme Court of Victoria took an extremely technical approach in National Workforce v Australian Manufacturing Workers Union (No 2) [1998] 3 VR 265; (1997) 76 IR 200.

there is nothing in the material to indicate that there was, or is, such an imbalance in the industrial strengths and negotiating powers of the parties in favour of the respondents, or such fragility of the operational circumstances of the applicant, so as to give to the respondents any basis to believe that to give the applicant all or any of the notices under s 170MO of the Act would coerce it to agree to the agreement propounded by the respondents.  

Cooper J held that the notices themselves presented a number of choices to the recipient as to what course of action to take. The most that could be said was that the giving of the notices was intended to influence and persuade Anglo Coal, which was far short of an intention to negate choice. Further, there had not in fact been such a coercive effect. On the second part of the test, whether the conduct was unlawful, illegitimate or unconscionable, Cooper J held that the giving of the notices was a procedural step specifically contemplated by the WR Act. He concluded that Anglo Coal had failed to make out a serious question to be tried on two of the necessary elements of the test, and did not proceed to the third step. It is worth noting that only a few weeks after Cooper J’s decision another employer, Capricorn Coal Management, obtained a s 170MH order terminating the CA in force, suggesting a carefully targeted legal campaign on their part. Ultimately the parties reached a new agreement, which was certified late in 2003, so it is unlikely that Cooper J’s decision will go to a final hearing. In the meantime, the way seems open for unions enjoying high membership density at relatively small workplaces to effectively sidestep the statutory three days’ notice requirement.

Conclusions

This article has examined various strategies developed by repeat players in the commission and the courts to enforce aspects of what might be described as good faith bargaining and to inhibit the exercise of an opponent’s bargaining power. On the whole, the climate for unions seeking a commission order effecting fair bargaining by employers is uncertain. While some commissioners believe there is an ‘implicit duty’ to bargain in good faith, effective remedial orders that compel its performance are simply not available. The commission is prepared to issue procedural directions that support fair bargaining, but not those that explicitly require an employer to bargain with a union, or diminish the right of the employer to pursue its preferred type of agreement. Applications to terminate a CA or AWA during bargaining do not enliven the public interest even if they result in a reduction of wages or conditions for the employees concerned unless the employer has not been bargaining in good faith in other ways. The termination of bargaining period cases further demonstrate that pattern bargaining and a union’s right to take even protected industrial action can be severely and comparatively easily constrained by s 170MW orders. Such orders operate as de facto remedies that immediately alter the balance of bargaining power in the employer’s favour.

106 Ibid.
107 Ibid, at [41]–[42].
108 Re Capricorn Coal Management Pty Ltd and CFMEU and CEPU Certified Agreement 2001 (unreported, AIRC, Bacon C, Print PR939652, 21 October 2003).
Remedies available from the Federal Court to enforce the prohibitions on coercion and duress also tend to operate in favour of employers. Although s 170WG seemed to offer some hope for unions trying to avoid employer attempts to de-unionise workplaces by offering AWAs and for workers who did not want to sign AWAs, the structure of the WR Act provisions and a narrow construction of the concept of duress by the courts have ultimately meant that duress by employers is a difficult matter to prove. Further, the Schanka litigation shows that remedies for duress available at final hearing are virtually irrelevant for plaintiff employees in this sense. Section 170NC has proved more amenable to stopping or punishing union conduct than it is in regard to employer conduct. The court is usually reluctant to find that employers intend to exert pressure on employees to negate choice. Yet employer conduct that forces employees to agreement on the employer’s terms includes delaying and stalling negotiations, resisting demands or exercising the right to refuse to negotiate at all. On the basis of the decisions to date, such activities would rarely breach s 170NC, and are difficult for many unions to counteract in practice, especially since its members are often eager to secure a wage increase. Indeed, simply refusing to negotiate is so ‘coercive’ in effect, and so difficult for most unions to overcome, that it is almost a self-help remedy in its own right. In contrast, the court has been easily convinced that ‘unprotected’ industrial action by employees is intended to negate the employer’s choice, even if the absence of protection is for purely technical reasons. Further, in practice, industrial action may be taken for a number of other purposes in the bargaining context that stop short of intending to completely negate the employer’s choice. Perhaps most tellingly, given that the court applies the same legal tests in determining whether duress and coercion has been exerted, it is difficult to reconcile decisions that refusing a person employment unless he or she signs a (non-negotiable) AWA is not duress, with others to the effect that technically unprotected industrial action or verbal threats by union officers do constitute coercion.

These outcomes appear almost inevitable in the context of a bargaining paradigm that ensures that employers cannot be ordered to bargain fairly, and that government and employer pressure tactics in bargaining can only rarely be classed as unlawful, illegitimate or unconscionable. Under the WR Act bargaining framework, it is easier for employers to limit the ‘ethical flexibility’ permitted to unions and employees, than it is for unions to use the law to require employers to bargain fairly.